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together

## What to Do When OSHA Calls

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# Program Agenda

- OSHA and the nuclear industry  
(Nina Stillman)
- OSHA and the electrical industry  
(Jonathan Snare)
- Q and A



# OSHA's Enforcement in the Nuclear Industry

# OSHA and the Nuclear Industry: Background

- The Occupational Safety and Health Act of 1970 (OSH Act) governs workplace safety and health through promulgation of standards, inspections, and protecting workers who make safety complaints from retaliation.
- Section 4(b)(1) of the OSH Act provides that if another federal agency exercises statutory authority to prescribe and enforce standards or regulations affecting occupational safety or health, then OSHA is preempted from exercising its jurisdiction. Agencies that preempt OSHA's jurisdiction include, for example, the FAA, the Coast Guard, the FRA, the DOT and the NRC.
- Twenty-three states have adopted their own state plans. So long as those state plans meet or exceed OSHA standards and are approved by OSHA, OSHA permits them to operate independently of federal OSHA.



# OSHA and The Nuclear Industry: Background (cont.)

- There is a split in the circuits as to what is meant by the exercise of jurisdiction. Some circuits have taken the position that so long as another federal agency exercises *any* safety and health jurisdiction over a specific workplace, OSHA is then preempted from enforcement in any **area** of that workplace. Other circuits have held that, if there are specific workplace safety and health conditions that are not regulated by another federal agency — even if it could have done so — then OSHA may go into any unregulated **nook and cranny** in order to enforce OSH Act safety and health jurisdiction. The Supreme Court elected not to resolve this issue in *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 241n.7(2002), so the matter is still undecided.
- Needless to say, OSHA adopts the nook and cranny interpretation as it enlarges its jurisdiction into areas that would otherwise be preempted under Section 4(b)(1).

# OSHA/NRC Memorandum of Understanding

- On October 31, 1988, OSHA and NRC jointly published their ***Memorandum of Understanding Between the Nuclear Regulatory Commission and the Occupational Safety and Health Administration; Worker Protection at NRC-licensed Facilities*** (53 Fed. Reg. 43,950) (MOU).

# OSHA/NRC Memorandum of Understanding cont.

- The MOU states that it is designed to:
  - provide general guidelines for interface activities between the two agencies
  - ensure there are no gaps in worker protection at NRC-licensed facilities
  - avoid duplication of effort by the two agencies “where it is not always practical to sharply identify boundaries between the NRC’s responsibilities for nuclear safety and the OSHA’s responsibilities for industrial safety”
  - define the general areas of responsibilities of both agencies
  - provide general procedures for coordination between OSHA and NRC

# OSHA/NRC Memorandum of Understanding (cont.)

- The MOU identifies four types of hazards associated with NRC-licensed facilities:
  - Radiation risk produced by radioactive materials,
  - Chemical risk produced by radioactive materials.
  - Plant conditions that affect the safety of radioactive materials and thus present an increased radiation risk to workers, and
  - Plant conditions that result in any occupational risk, but do not affect the safety of licensed and radioactive materials.
- The MOU concludes that generally NRC covers the first three hazards and OSHA covers the fourth hazard.

# OSHA And the Nuclear Industry: The Jurisdictional Issue

- The MOU expressly states that “Both NRC and OSHA have jurisdiction over occupational safety and health at NRC-licensed facilities.” In so doing, the MOU appears to endorse the nook and cranny approach to preemption.
- However, NRC acknowledges OSHA jurisdiction at NRC-licensed facilities *only to the extent that NRC is willing to allow OSHA to exercise jurisdiction* and that NRC reserves the right to veto any citations that OSHA wishes to issue and to veto any abatement required to correct an OSHA violation.
- Therefore, despite the language in the MOU, it is hardly clear that NRC has truly ceded any safety and health regulatory jurisdiction to OSHA, and that is an issue that still must be resolved by the Occupational Safety and Health Review Commission and, ultimately, by the courts of appeals.

# OSHA And the Nuclear Industry: The Jurisdictional Issue (cont.)

- Until this jurisdictional issue is resolved, NRC-licensed facilities should strongly consider challenging OSHA's jurisdiction to conduct an inspection at the outset.

# What to Do if OSHA Shows Up at a NRC-Licensed Facility

- As a practical matter, OSHA will not be conducting programmed inspections at nuclear facilities for several reasons:
  - The MOU notes that the “safety record of NRC-licensed nuclear power plants is such that OSHA inspection at these facilities are conducted normally as a result of accidents, fatalities, referrals, or worker complaints.”
  - OSHA Compliance Safety and Health Officers (CSHOs) simply do not have the expertise to conduct such inspections.
  - Despite the MOU, NRC has not shown a great willingness to refer OSHA to conduct an inspection at NRC-licensed facilities.
  - As a result of its first attempt to cite a nuclear power plant, OSHA now knows that it is likely to face a jurisdictional challenge to future inspections at the outset.

# What to Do if OSHA Shows Up at a NRC-Licensed Facility (cont.)

- However, if OSHA receives a complaint from an employee or the union, or a workplace fatality occurs that is not directly attributable to a release of radioactive materials, OSHA may attempt to conduct an inspection at an NRC-licensed nuclear power plant until such time as the jurisdictional issue is resolved.
- Employers are not notified in advance of OSHA inspections.
- When the CSHO arrives, ask what type of inspection OSHA intends to conduct, i.e., complaint, programmed, or referral by another agency.



# What to Do if OSHA Shows Up at a NRC-Licensed Facility (cont.)

- If it is a complaint inspection, ask to see the complaint. Employers are absolutely entitled to see the complaint so long as the name of the complaining employee is redacted.
- If it is a programmed inspection, ask for the selection criteria.
- If it is a referral inspection, ask for as much information as possible about the referral, e.g., the referring agency, the nature of the issue referred, when the referral was made.
- Advise the CSHO that, due to a question as to OSHA's jurisdiction to conduct the inspection, it will be necessary for you to consult counsel.
- Immediately contact counsel so that counsel can contact the OSHA Area Director and/or the Regional OSHA Counsel in the Office of the Solicitor of the Department of Labor to set out the company's position as to jurisdiction.

# What to Do if OSHA Shows Up at a NRC-Licensed Facility (cont.)

- You have several options at that point, which, in part, will be driven by OSHA and the Solicitor:
  - You can try to persuade OSHA to defer the inspection.
  - You can allow the inspection to proceed under protest and with a documented reservation of your right to challenge the jurisdiction of the inspection should a citation issue.
  - You can immediately challenge the jurisdictional issue through a warrant contest.
    - If you deny OSHA access for the inspection, OSHA must ask the Solicitor to obtain a warrant from a federal magistrate judge.

# What to Do if OSHA Shows Up at a NRC-Licensed Facility (cont.)

- Because the Solicitor can seek the warrant *ex parte*, your counsel should try to get an agreement from the Solicitor to advise you of when the petition for the warrant will be presented to the magistrate so that you can attend before the warrant is issued. Note: The Solicitor is not obligated to accede to this request.
- If the warrant issues without your ability to participate, move quickly to quash or to seek a protective order.
- *Do not violate the warrant*; however, be prepared to move quickly to quash or limit the warrant before the inspection goes too far. (Given the amount of training/preparation that the CSHO must undergo before she/he is allowed into a reactor containment building, there will be some time to seek a motion to quash.)

# Pending OSHA Proceeding Regarding Jurisdiction of an NRC-Licensed Facility

- If the Solicitor is aware that you have knowledgeable OSHA counsel, she/he may be more open to seeking a compromise early on regarding the jurisdictional issue because the jurisdictional issue is currently being vigorously litigated in a pending proceeding.
  - The underlying inspection resulted from a union complaint.
  - OSHA was permitted by the site owner to conduct the inspection in a RCB
  - OSHA prepared a citation with multiple items but NRC vetoed the majority of the proposed citations. OSHA ended up issuing only four citations to the site owner, with identical citations issued to the two contractors doing the work during the outage.

# Pending OSHA Proceeding Regarding Jurisdiction of an NRC-Licensed Facility (cont.)

- After almost two years of contest and discovery, the nuclear power company and the two contractors filed a summary judgment motion on the jurisdictional issue. Because the judge found a question of fact between two NRC affidavits as to the scope of NRC's jurisdiction, he set the case for hearing.
- Thereafter, OSHA agreed to a very favorable settlement for the site owner, with a further agreement that, in settling the matter, the company was not in any way waiving its right to raise the jurisdictional issue in the future.

## Pending OSHA Proceeding Regarding Jurisdiction of an NRC-Licensed Facility (cont.)

- Because OSHA would not vacate the citations against the two contractors, they are proceeding with the citation contest, primarily on the jurisdictional issue.
- Recently, the judge ordered OSHA to produce to the two contractors information about the citations that were vetoed by NRC. OSHA is refusing to do so, apparently believing that the evidence of the breadth of NRC's veto authority with respect to OSHA's issuance of citations will be detrimental to OSHA's position that NRC has ceded, at least in part, jurisdiction to OSHA.

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# OSHA's Enforcement in the Electrical Power Generation Industry



# Electrical Power Generation Industry

- This part of the presentation will focus on the electrical power generation industry, which includes energy for electricity and power generated by all sources other than nuclear, such as
  - fossil fuels (natural gas, petroleum, and coal)
  - geothermal
  - solar thermal
  - hydroelectric and dams
  - wind
  - chemical energy

# OSHA Standards Applicable to Electrical Power Generation Industry

- Electrical Power Generation, Transmission and Distribution (Subpart R—Section 1910.269)
- Subpart V of OSHA’s Construction Standards (Sections 1926.950 to 1926.960)
  - OSHA is in the process of updating and revising this rule with the projected publication date for the final rule to be May 2012 (most likely this deadline will be extended)
  - This rule will also revise several general industry requirements “primarily affecting electric transmission and distribution work, including provisions on electrical protective equipment and foot protection” according to OSHA’s latest regulatory agenda
- Subpart S—Electrical (Sections 1910.301 to 1910.399)
- Lock-out/Tag-out Standard (Section 1910.147)
- Walking-Working Surfaces Standard (Subpart D)
  - OSHA is in the process of updating and revising this rule. A second NPRM was issued in May 2010, the public hearing was held in January 2011, and a final rule is projected to be published in October 2012 (this deadline will most likely be extended)
- Personal Protective Equipment Standard (Subpart I)
- Certain Construction Safety Standards including Subpart M in Section 1926 for fall protection
- Medical and First Aid (Subpart K)
- OSHA’s Hexavalent Chromium Standard (Section 1910.1026)
- Plus Hazard Communication, Recordkeeping, and a number of other standards

# The Inspection

- Ask to see the complaint/warrant
- Ask the CSHOs to wait until appropriate managers/attorneys are notified
- Opening conference
- Document requests and reviews
- The walk-around
- Employee interviews
- Identify trade secrets
- Sampling/Photos/Videotapes
- Contractor employee issues
- Closing conference

# Inspection Interviews and Depositions

- **Management Personnel**
  - The employer has the right to be present at interviews of management personnel
  - The employer should schedule management interviews
  - Management witnesses should be properly prepared for OSHA interviews and depositions
  - Attorneys may/should play a role in OSHA interviews
- **Exempt Non-Supervisor Issues**

# Inspection Interviews and Depositions (cont.)

- Hourly Employees
  - OSHA usually demands privacy for hourly employee interviews
  - OSHA usually allows a union representative to be present
  - Employee may request management or attorney presence
  - There are factors in favor of allowing OSHA private interviews on employer time and premises
  - OSHA must be reasonable regarding its interview requests

# Production of Documents

- Generally, employers should insist on written document requests from OSHA
  - Allows for analysis of possible objections
  - Assists in keeping track of produced documents
  - Allows sufficient time to ensure appropriate compliance

## Production of Documents (cont.)

- Exceptions to prior written request requirement:
  - OSHA 300 Logs and Forms 301 must be provided within four hours of a request by OSHA
  - Required written programs, e.g., Hazard Communication, LOTO, Hearing Conservation, Respiratory Protection, Bloodborne Pathogens, Confined Space, Emergency Action, HAZWOPER, PSM
- Employers must ensure compliance by OSHA with Medical Access Order requirements for review of personally identifiable employee medical records.

# Privileges

- Determine applicable privileges for existing documents
  - Attorney-Client Privilege
  - Work Product Doctrine
  - Privilege of Self-Critical Analysis
- Create privileged documents
  - Involvement of counsel
  - “In anticipation of litigation”
  - Controlled distribution



# Fatality/Catastrophe Inspections

**FATALITY:** An employee death resulting from an employment accident or illness generally caused by or related to a workplace hazard.

**CATASTROPHE:** The hospitalization of three or more employees resulting from an employment accident or illness generally caused by or related to a workplace hazard.

# Fatality/Catastrophe Inspections (cont.)

- Expedited inspection by OSHA
- Generally involves extensive interviews
- Potential for criminal violations
- Emphasis by OSHA on the “willfulness” of the violation
- Possibility of concurrent comprehensive inspection of work site
- Contact by OSHA of family members of injured or deceased employees
- Expedited involvement of experts/OSHA attorneys

# Sources of Criminal Liability

- Under OSH Act (29 U.S.C. § 666(e)-(g))
  - Willful violation causing death of an employee
  - Giving advance notice of an inspection
  - Making false statements, representations, or certifications
- Under state general criminal law
- Under specific state workplace safety and health statute

# Criminal Liability Issues

- Need for immediate post-accident attorney involvement
- Early determination of possible conflict issues
- Creation of post-accident documentation under privilege
- Preparation of witnesses for all interviews/depositions
- Possible Fifth Amendment issues
- Special settlement issues

# Inspection DOs

- DO** read the warrant/complaint carefully
- DO** stay with the CSHO on the walk-around
- DO** prepare management employees for OSHA interviews
- DO** be present during management interviews

# Inspection DON'Ts

**DON'T** let the CSHO frighten you from asserting your rights

**DON'T** alert OSHA to documents

**DON'T** make statements that could undermine possible defenses

**DON'T** make abatement commitments unless the violation is obvious and indefensible

**DON'T** generate unprivileged inspection-related documents

**DON'T** be afraid to halt the inspection in order to consult an attorney

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